

## QUARTERLY REPORT

July – September 2000

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [≤kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

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## **‘ZERO TOLERANCE’ POLICIES AND DUE PROCESS**

(This article is part of the continuing series on school safety issues affecting the preparation and implementation of emergency preparedness and crisis intervention plans by schools.)

When Congress enacted the “Gun-Free Schools Act of 1994,” 20 U.S.C. §8921 *et seq.*, it required of each state receiving federal education funds to have in effect a state law that requires local public school districts “to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.” 20 U.S.C. §8921(b)(1). States have enacted such laws, often expanding the provisions of the “Gun-Free Schools Act” to include other weapons, especially knives, as well as the possession of drugs.<sup>1</sup> The federal law is remarkably lacking in specificity as to certain important terms, such as “expulsion.”<sup>2</sup> The effect of the federal law in the reduction of student-possession of firearms at public schools is uncertain. However, it did serve as the impetus for the creation of a number of so-called “Zero Tolerance” policies.

In 1997, the Indiana General Assembly passed a number of provisions related to school safety, including the creation of an Indiana Safe Schools Fund to assist schools in creating and implementing the

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<sup>1</sup>Indiana enacted such a state law in 1995, including “deadly weapons” within its purview. A “deadly weapon” is defined by I.C. 35-41-1-8 as including a loaded or unloaded firearm, a taser, an electronic stun weapon, a chemical substance intended to cause serious bodily harm, an animal, or other weapon or device that could ordinarily be used or is intended to be used to cause serious bodily harm. The local school district’s superintendent can modify, on a case-by-case basis, the term of expulsion for a student expelled for possession of a firearm at school or on school property. See I.C. 20-8.1-5.1-10.

<sup>2</sup>The Office of Elementary and Secondary Education, U.S. Department of Education, in implementation guidance disseminated to the States on November 3, 1995, acknowledged the “Gun-Free Schools Act of 1994” (GFSA) contains no definition for “expulsion.” In a “Q. & A.” format, the following appeared:

**Q19. What is meant by the term “expulsion”?**

- A. The term “expulsion” is not defined by the GFSA; however, at a minimum, expulsion means removal from the student’s regular program. Expulsion does not mean merely moving a student from a regular program in one school to a regular program in another school. Care should be taken by local officials to ensure that a student who is determined to have brought a firearm to school is effectively removed from that setting.

Emergency Preparedness and Crisis Intervention Plan required by the State Board of Education,<sup>3</sup> combat truancy, and purchase equipment and provide training to enhance school safety. In order to receive a grant, a public school district must submit a safety plan that “must include provisions for zero (0) tolerance for alcohol, tobacco, drugs, and weapons on school property.” I.C. 5-2-10.1-6.

Other states have enacted similar laws, especially in response to community concerns heightened by the spate of school-related shootings that afflicted a number of public elementary, middle, and high schools around the country. However, emerging judicial constructions indicate that “Zero Tolerance” does not mean a suspension of the requirements associated with any policy that carries with it a sanction. These requirements include: (1) the policy be in writing; (2) the students and their parents be aware of the policy; (3) the terms of the policy must be unambiguous; (4) procedural due process be provided any student accused of violating the policy; (5) substantive due process must be provided as well; and (6) any sanctions imposed must be based upon some evidence. The substantive due process requirement appears to be a primary concern among the courts reviewing sanctions imposed through a seemingly inflexible application of a “Zero Tolerance” policy rather than the exercise of the type of individualized judgment due process requires.

### ***Expulsion and Loss of Credit***

Indiana has one important case currently pending before the Indiana Supreme Court. South Gibson School Board v. Sollman, 728 N.E.2d 909 (Ind. App. 2000), *transfer granted*. The school had what the trial court referred to as an “uncompromising zero tolerance towards drugs policy, a policy clearly and openly explained to all of the students” at the school, including Sollman. Three days before the end of the first semester, two law enforcement officers with a drug-sniffing dog toured the school’s parking lot. The dog singled out Sollman’s car. He was retrieved from class and asked to unlock his car. In the car’s unlocked glove compartment, a bag containing a small amount of marijuana was found. Sollman was suspended and then expelled for the remainder of the first semester, all of the second semester, and for summer school. He appealed the expulsion to the school board, which eventually remanded the matter to the original expulsion examiner. However, the expulsion examiner reached the same conclusion, and the school board declined to review the matter further. The school also refused to provide him any credit for the work completed during the first semester.

The student sought judicial review. The trial court found the school expelled the student for a period longer than permitted by Indiana law and found further that the school “acted in an arbitrary and capricious manner and abused its discretion in denying [the student] credit for first semester courses for which he may have earned a passing grade in spite of the work assignments missed.” The trial court upheld the student’s expulsion but ordered the expulsion to end at the conclusion of the school year. The court further ordered the school to award credit to the student for the first semester courses where it is

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<sup>3</sup>See **Quarterly Report** October-December: 1998.

determined he “earned a passing grade for the courses after the assessment of zeros for all work missed as a result of the suspension.” At 913. The school board appealed.

The Court of Appeals prefaced its decision with a statement of position, noting that loss of credit or reduced grades are typically the consequence of being suspended or expelled from school, but that individual considerations should be made rather than the rigid application of a policy.

This case...presents a situation in which it is far from clear that the student’s separation from school attendance lasted long enough to result in forfeiture of credit. Indeed, [the student] was ejected from school three days before the end of the first semester, and the record indicates that he might have been in a position to pass his first semester course even if he were awarded “zeros” for first semester assignments occurring after his ejection. Under these circumstances, we discern no reasonable basis for requiring that [the student] forfeit all first semester credit merely because he was expelled during that semester. Such a loss of credit would be reasonable only under circumstances where expulsion causes the student to miss so much coursework that an award of credit would be impossible. But here the period of first semester expulsion was short, and [the student’s] investment of time and effort in first semester coursework may not have been so insubstantial as to make him ineligible for credit.

At 914. Accordingly, the Court of Appeals indicated it would uphold the trial court, finding the school board “acted arbitrarily and capriciously by summarily denying [the student] first semester credit.” *Id.*

The school board argued that its denial of first-semester credit based solely on the student’s status as expelled, albeit for only three days, was not arbitrary or capricious. The school board asserted that it had statutory authority to deny credit as well as case law that supported such actions. The appellate court disagreed, finding that the case cited did not address the issue of automatic denial of credit and the statutory definition for “expulsion” does not mandate a loss of credit.<sup>4</sup> According to the appellate court, the school board’s “public policy” arguments were more compelling but unpersuasive given the facts of this case. At 916. In essence, the school board argued that, if it were not to deny credit for any student expelled, there would be unequal and, thus, unfair treatment of students based upon relative academic ability and the timing of the disciplinary sanction.

It would appear to be the Board’s position that if expulsion does not result in loss of credit and if a student may receive credit under circumstances identical to those under

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<sup>4</sup>See I.C. 20-8.1-1-10(a)(2), defining “expulsion,” in part, as meaning a disciplinary action “whereby a student...is separated from school attendance for the balance of the current semester or current year unless a student is permitted to complete required examinations in order to receive credit for courses taken in the current semester or current year[.]”

which [Sollman] was expelled, then a student's level of academic success could alone determine the kind of discipline the student receives...

The Board further seems to indicate that certain purposes of school discipline—i.e., deterrence of both the offending student and non-offending students—are not served by making the time of the student's offense determinative of the sort of discipline the student will receive.

Id. The Court of Appeals stated that expulsion is a deterrent throughout the academic year, including at the end of a semester, where, as in this case, the expulsion will have a negative impact on the student's grades. Id. "Thus, the threat of expulsion is the deterrent and the act of expulsion is the punishment. But to further punish the student by stripping him of credit for work performed while in good standing at the school is simply wrong." At 917.

[T]he goal of our schools is to educate our children. When students with disciplinary problems interrupt this goal, appropriate action must be taken to maintain order in the school, including expulsion if appropriate... For those students to be denied credit where credit is due runs contrary to the purpose of an educational institution, and such a denial under the circumstances of this case is arbitrary and capricious.<sup>5</sup>

Id. The appellate court acknowledged that it is not the role of a court "to question professional expertise or to undermine school officials' legitimate exercise of statutory authority. However, it is our duty to determine whether such expertise and authority are employed arbitrarily and capriciously. By upholding the trial court's action in this case, we merely acknowledge the reasonable limits within which official expertise and authority must exist." Id.

The Indiana Supreme Court entertained oral argument on this matter on December 21, 2000.

### ***Substantive Due Process and "Irrationality"***

Seal v. Morgan, 229 F.3d 567 (6<sup>th</sup> Cir. 2000) involved a Tennessee public school district that expelled a student (Seal) from school after a knife was found in the glove compartment of his car. The knife actually belonged to a friend of Seal while the car belonged to Seal's mother. Although Seal knew previously that his friend had the knife one night as they drove around in Seal's mother's car, he was

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<sup>5</sup>"School Purposes" is actually defined at I.C. 20-8.1-1-8 as including the responsibility "[t]o promote knowledge and learning generally"; "[t]o maintain an orderly and effective educational system"; and "[t]o take any action under authority granted to [public] school corporations and their governing bodies" by statute. Neither the school board nor the appellate court reference this statute although both implicate the educational functions and purposes of the public schools.

unaware that his friend had eventually placed it in the glove compartment of the car. Seal and his friend were also members of the school's band. The following night, they dressed for a performance at a high school game. Other students reported they had been observed drinking alcohol. School personnel searched their coats and instrument cases for alcohol but did not find anything. They then searched Seal's car in search of a flask. No flask was found, but two cigarettes in a crumpled pack, a bottle of amoxicillin pills (an antibiotic for which Seal has a prescription), and the knife in the glove compartment were found during this search. Seal was recommended for expulsion for possession of the knife, tobacco, and the pills. After a disciplinary hearing, the school's principal recommended Seal be suspended pending expulsion for possession of the knife.<sup>6</sup>

Seal appealed to the school board. The school board's hearing examiner received testimony that Seal knew his friend had the knife the day before but was unaware that his friend had placed the knife in the glove compartment of his mother's car. Two other witnesses testified that Seal was not in the car when his friend placed the knife in the glove compartment and did not know it was there. The school board's hearing examiner upheld the principal's recommended decision, noting that exculpatory testimony does not negate the fact that Seal possessed a weapon on school property in contravention of the school's "zero tolerance" policy. Seal appealed to the full school board.

The school board heard again of the circumstances surrounding the placement of the knife in the glove compartment and the lack of knowledge on the part of Seal that the knife was there. One school board member indicated that the school board has "to be consistent in sending a clear message to students" and that Seal should "be held responsible as a driver for what is in your car." At 572. The school board then upheld by a unanimous vote Seal's suspension pending expulsion.<sup>7</sup>

The policy under which Seal was expelled provides that a student may not "possess, handle, transmit, use or attempt to use any dangerous weapon (including knives) in school buildings or on school grounds at any time" and that students who are found to have violated the policy "shall be subject to suspension and/or expulsion of not less than one...year." The policy also contains language according the superintendent the authority to modify the suspension requirement on a case-by-case basis, but the superintendent asserted that it is "not clear" whether he has the authority to affect any suspension or expulsion ordered by the school board. At 573.

Tennessee, like Indiana, enacted legislation that encouraged local public school districts to develop and implement "zero tolerance" policies that would "impose swift, certain and severe disciplinary sanctions

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<sup>6</sup>No action was taken regarding the alleged possession of tobacco or the amoxicillin tablets.

<sup>7</sup>The 6<sup>th</sup> Circuit Court of Appeals, at 573, noted that the school board's transcript is a scant three pages long. This brevity appears to affect the 6<sup>th</sup> Circuit's opinion that the school board failed to exercise its adjudicatory function, relying instead upon an inflexible application of its "zero tolerance" policy.

on any student” who, *inter alia*, “brings a...dangerous weapon” onto school property, or “[p]ossesses a dangerous weapon” on school property. Id.

Seal sought judicial review, alleging civil rights violations of the Fourteenth Amendment (due process, equal protection) and Fourth Amendment (illegal search). The federal district court found for the school board and the superintendent on the equal protection and Fourth Amendment claims, but found the school board was not entitled to summary judgment on the due process claim nor was the superintendent entitled to summary judgment based on qualified immunity.

Upon appeal to the 6<sup>th</sup> Circuit, the court noted that “the Fourteenth Amendment provides that one may not be deprived of life, liberty, or property without due process of law. State law determines what constitutes ‘property’ for due process purposes. [Citation omitted.] It is undisputed that Seal enjoyed a property interest in his public high school education under Tennessee law.”<sup>8</sup> At 574. The court then addressed the two elements of due process: procedural and substantive.

Due process (often summarized as “notice and an opportunity to be heard”) is a right to a fair procedure or set of procedures before one can be deprived of property by the state.... In the context of disciplining public school students, the student’s interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. [Citation and internal punctuation omitted.] Schools, of course, have an unquestionably powerful interest in maintaining the safety of their campuses and preserving their ability to pursue their educational mission.

Id. The court noted that Seal received procedural due process. However, “[h]is argument is thus one of substantive due process, the other component of due process. In essence, Seal argues that the Board’s ultimate decision was irrational in light of the facts uncovered by the procedure afforded him.” Id.

Government actions that do not affect fundamental rights or liberty interests and do not involve suspect classifications will be upheld if they are rationally related to a legitimate state interest.... In the context of school discipline, a substantive due process claim will succeed only in the rare case where there is no rational relationship between the punishment and the offense. [Citation and internal punctuation omitted.] ...

That said, suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest. No student can use a weapon to injure another person, to disrupt school operations, or, for that matter, any other purpose if the student is totally unaware of its

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<sup>8</sup>Indiana’s Constitution provides the same interest to its citizens. See Article 8, Sec. 1.

presence. Indeed, the entire concept of possession—in the sense of possession for which the state can legitimately prescribe and mete out punishment—ordinarily implies knowing or conscious behavior.

At 575-76. The court rejected the school board’s assertion that possession need not be “conscious,” and that such a standard, generally employed in criminal law, is a “technicality” that should not be employed in school-based disciplinary actions. “Frankly,” the court wrote at 576, “we find it difficult to understand how one can argue that the requirement of conscious possession is a ‘technicality.’” The court, at oral argument, challenged the school board’s position that unconscious possession of a dangerous weapon should be treated the same as conscious possession under the school’s Zero Tolerance Policy. The court posed a hypothetical example involving a high school valedictorian who has a knife “planted” in his backpack by a vindictive student. Assuming the school board accepted that the valedictorian was the victim of this circumstance, would the board’s Zero Tolerance Policy require his mandatory expulsion?

Counsel for the Board answered yes. After all, counsel argued, the Board’s policy requires “Zero Tolerance,” and the policy does not explicitly *say* that the student must know he is carrying a weapon. [Emphasis original.] Only after the Board’s counsel sensed—correctly—that this answer was very difficult to accept did counsel backtrack, suggesting that perhaps an exception could be made for our unfortunate hypothetical valedictorian. We find it impossible to take this suggestion seriously, however, and not simply because counsel had just finished arguing the opposite. The suggestion is totally inconsistent with the Board’s position in this case, which is that Zero Tolerance Policy uniformly requires expulsion whenever its terms are violated.

Id. The court acknowledged that school-based discipline is not subject to the strict requirements of criminal law and that the school board’s decision “to expel... is not vulnerable to a substantive due process attack unless it is irrational.” At 578.

We believe, however, that the Board’s Zero Tolerance Policy would surely be irrational if it subjects to punishment students who did not knowingly or consciously possess a weapon. The hypothetical case involving the planted knife is but one illustration of why.

Id. The court also posed another hypothetical: A student “spikes” the punch at a school dance. Several students, not knowing of the altered condition of the punch, take drinks.

Under the Board’s reasoning, the student who spiked the punch bowl would of course be subject to suspension or expulsion, but so would any of the students who innocently drank from the punch bowl, even if the school board was completely convinced that the students had no idea that alcohol had been added to the punch. Suspending [the



innocent students]...would not rationally advance the school's legitimate interest in preventing underage students from drinking alcohol on school premises any more than suspending a handful of students chosen at random from the school's directory.

Id. The court conceded that a student caught possessing a dangerous weapon could lie about his knowledge regarding same. "Simply because a student may lie about what he knew, however, does not mean that it is unnecessary to address the question of what he knew before meting out punishment." The court also rejected the school board's insistence that Seal's knowledge of the weapon's existence in the glove compartment of his mother's car "was completely irrelevant, and that the Board's Zero Tolerance Policy required Seal's expulsion regardless whether he knew the knife was in his car." Id. The court noted that the Board made no effort to consider the knowledge Seal may or may not have possessed regarding the presence of the weapon. "The absence of any evidence regarding Seal's knowledge is exactly why the Board is *not* entitled to summary judgment." (Emphasis original.) Id.

Although the school board did provide a number of different opportunities for Seal to plead his case, "[b]ased on the evidence of record, it appears that nothing that Seal could have said at any of those hearing would have made one bit of difference." At 579.

A school board is not required to accept exculpatory statements of a student and conclude that a student did not knowingly violate a school policy. A school board could reach a contrary conclusion. "If that occurs, due process would be satisfied as long as the procedures afforded the student were constitutionally adequate and the conclusion was rational." Id. However, the school board's lack of fact-finding militates against a court inferring on its behalf that the decision to expel was rationally related to a legitimate state purpose.

The fact that we must defer to the Board's rational decisions in school discipline cases does not mean that we must, or should, rationalize away its irrational decisions. And when it is not clear that the Board's decision was rational, because it is impossible to conscientiously determine from the record what the Board's actual decision was, then the Board, as well as other school boards with similar "Zero Tolerance" policies, should not be entitled to summary judgment in civil rights actions arising from their decisions to impose long-term suspensions and expulsions.

Id. Because the record presented by the school board, coupled with its representations of strictly applying its Zero Tolerance Policy without regard to individual circumstances, "a reasonable trier of fact could conclude that Seal was expelled for a reason that would have to be considered irrational."

The court accepted that school safety is an important concern of school boards, and the right to discipline students who commit serious violations is a legitimate interest related to safety.

But we cannot accept the Board's argument that because safety is important, and because it is often difficult to determine a student's state of mind, that it need not make

any attempt to ascertain whether a student accused of carrying a weapon knew that he was in possession of the weapon before expelling him....

[T]he Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a Zero Tolerance Policy that purports to make the students' knowledge a non-issue. We are also not impressed by the Board's argument that if it did not apply its Zero Tolerance Policy ruthlessly, and without regard for whether students accused of possessing a forbidden object knowingly possessed the object, this would send an inconsistent message to its students. Consistency is not a substitute for rationality.

At 581. The court did reverse the district court's denial of summary judgment to the superintendent, finding that he was entitled to qualified immunity because it was not clear to the superintendent that he had the authority to modify disciplinary actions of the school board.

### ***Unwritten Policies and Degrees of Due Process Protection***

Colvin v. Lowndes County, Mississippi School Dist., 114 F.Supp.2d 504 (N.D. Miss. 1999)<sup>9</sup> involved a sixth grade student with a history of academic difficulties. He was retained in the fourth grade, but by the sixth grade was again struggling. He had been identified as having Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD) and was taking medication. Colvin was not a disruptive student. One day while removing a book from his book bag, a miniature knife fell to the floor. He picked it up and placed it in his pocket. Another student informed the teacher of the incident. When confronted, he admitted to having the knife, stated he was not aware of its presence in his book bag, and handed the knife to the teacher without incident or threatening gesture.<sup>10</sup> He cooperated fully with school officials who investigated the incident. He was suspended from school for nine (9) days, pending a hearing. Expulsion was recommended.

Following hearing on the matter, the hearing examiner noted the student was not eligible for special education, adding that he "is questionably handicapped with Attention Deficit Hyperactivity Disorder." He found that Colvin understood the knife should not be brought to school, but the knife itself was

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<sup>9</sup>This opinion was later reissued with slight amendments. See Colvin v. Lowndes Co. (Ms.), 32 IDELR ¶32 (N.D. Miss. 2000).

<sup>10</sup>The court notes that the knife is a miniature key-chain knife containing a fingernail file, a small pair of scissors, and a closed-end cuticle knife. The knife contains the insignia of a medical or pharmaceutical company and was given to the student by his mother, a registered nurse. The student also had in his possession a hand-held pencil sharpener, which the school originally characterized as a "modified home-made razor blade." 114 F.Supp.2d at 507, *n.* 3.

“nothing more than a Swiss army utensil.” The assistant principal testified that Colvin was a model student. The principal urged leniency in the matter. Based on the foregoing, the hearing examiner recommended expulsion for a year “with the period of expulsion to be modified...by suspending imposition of the expulsion for the school year, except for a period of one (1) day, and that upon return of the student after that day, the student and his parents be made aware that any other violation of the school’s rules and regulations will result in imposition of the remainder of the expulsion period.” At 507-08. There was additional testimony from “numerous school officials and teachers,” who, “without fail, testified that [Colvin] was a pleasant and respectful student, displaying no aggressive tendencies and posing no disciplinary problems.” At 508. Nevertheless, the school board declined the recommendation and expelled Colvin for one year.

The student sought judicial review, alleging violations of the Fourteenth Amendment (due process) and the Individuals with Disabilities Education Act (IDEA).<sup>11</sup> The federal district court, in ruling on the student’s request for injunctive relief, noted that the dispute involves “the timely and often controversial topic of school district zero-tolerance policies.” Because of the Gun-Free Schools Act of 1994 and “numerous instances of school-related crime and violence, several states have implemented laws and countless school districts across the nation have established stringent policies regarding the presence of weapons and drugs on school premises.” At 506.

These “zero-tolerance” policies provide for immediate suspension or expulsion of students that possess weapons or drugs on school grounds. In general, a student found carrying a weapon, such as a gun or a knife, on school property is given no second chance, no appeal, and no guarantee of alternative school programs or education.

At 506. The court noted that Mississippi has suffered from such violent incidents. On October 1, 1997, two students were killed and seven wounded when a sixteen-year-old student opened fire at Pearl High School in Pearl, Mississippi, after beating and stabbing to death his mother.

While this court is cognizant of the unenviable position of the school boards of this and other states and of their aim to create a school environment conducive to learning by eliminating the fear of crime and violence, such efforts must be balanced with the constitutional guarantees afforded to the children that enter the school house door.

Id. The district court noted that entitlement to a public education is a property interest protected by the

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<sup>11</sup>IDEA, 20 U.S.C. §1400 *et seq.*, does contain a provision regarding procedural safeguards for students not yet identified as having a disability requiring special education and related services. See 20 U.S.C. §1415(k)(8). However, for such procedural safeguards to attach, there would have had to be some knowledge on the part of the school that the student might have a disability. In this case, the court found that the school had the requisite knowledge. As this is not part of the main thrust of this article, this aspect of the court’s decision will not be discussed further. For the implementing federal regulation, see 34 CFR §300.527. For the implementing state regulation, see 511 IAC 7-29-8.

Due Process Clause of the Fourteenth Amendment, and that students do have substantive and procedural rights while at school. At 511. However, the more serious a penalty, the “higher degree of due process” must be afforded a student. Id., citing Lee v. Macon Co. Bd. of Ed., 490 F.2d 458, 459 (5<sup>th</sup> Cir. 1974). Quoting Lee, 490 F.2d at 460, the district court added that school boards are required to exercise independent judgment in determining appropriate punishment for a student. “Formalistic acceptance or ratification” of another’s recommendation in this regard, “without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process.”

While in the instant case, the Board did not defer to the judgment of another official, it did defer to an unwritten blanket policy of expulsion, absent reference to the circumstances of the infraction.... Employing a blanket policy of expulsion, clearly a serious penalty, precludes the use of independent consideration of relevant facts and circumstances. Certainly, an offense may warrant expulsion, but such punishment should only be handed down upon the Board’s independent determination that the facts and circumstances meet the requirements for instituting such judgment. By casting too wide a net, school boards will effectively snare the unwary student. The school board may choose not to exercise its power of leniency. In doing so, however, it may not hide behind the notion that the law prohibits leniency, for there is no such law. Individualized punishment by reference to all relevant facts and circumstances regarding the offense and the offender is a hallmark of our criminal justice system.

At 512, quoting in part Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So.2d 237, 241 (Miss. 1985). The court noted that the school district’s zero-tolerance policy does not appear in the district’s student handbook. The school board had been utilizing and applying the policy by voice vote at its meetings. The student handbook did provide that students charged with infractions were entitled to consideration by the school board of their school records and previous conduct when the school board determined the appropriate discipline to be provided to a student. At 512-13. Notwithstanding the language that does appear in the handbook, the president of the school board testified that “the District’s zero-tolerance policy requires that the board impose the same penalty regardless of the circumstances surrounding the offense: a one-year expulsion for a weapon or drug infraction.” At 513. The president admitted to the court that Colvin’s school records and previous conduct were not considered by the school board in determining that he should be expelled for one year. The school board members never saw or reviewed the “weapon” Colvin was found to possess until the lawsuit had been filed. Id.

The court did not chide the school board for overruling the hearing examiner’s recommendations because the school board had the authority to do so.

The court is, however, offended by the manner in which [the school board] blindly meted out the student’s punishment. Here, [Colvin] was expelled for a calendar year, a penalty that this court considers serious and worthy of a higher degree of due process.

Nothing in the record reflects independent consideration by the Board of the relevant facts and circumstances surrounding [Colvin's] case.... It appears that the Board simply knew that a weapon was found on school property and instituted a blanket penalty, absent review of relevant facts or circumstances.

Id. The court remanded the matter to the school board to reconsider the question of an appropriate penalty, utilizing “correct legal standards.” The court added that this case should not be construed as limiting the authority of school boards to enforce their rules and policies, including zero-tolerance policies, “provided, however, that the correct legal standard is applied and that the student’s due process rights are recognized.” Id.

### ***Unwritten Policies and Mandatory Expulsion***

Lyons v. Penn Hills School Dist., 723 A.2d 1073 (Pa. Cmwlth. 1999) also involved a middle school student with a miniature Swiss army knife similar to the one Colvin possessed. Lyons was a twelve-year-old seventh-grade student. While in chorus class one day, the teacher observed him filing his fingernails with the miniature Swiss army knife he had found in the hallway. The teacher asked for the knife, which the student willingly provided without incident. The student was later charged with possession of a weapon and was advised that this could result in his “permanent expulsion from the school.” At 1074.

At the hearing, a school official testified that the knife constituted a “weapon” under the district’s “zero tolerance policy” and that a “one year suspension was warranted. She also stated that the disciplinary determination did not involve consideration of a student’s record.” Id. The school district also presented a signed acknowledgment by the seventh-grade student that possession of a weapon at school was prohibited and would result in an expulsion of not less than one year. However, the school could not demonstrate that information regarding its discipline codes or zero-tolerance policy was ever sent directly to the parents although Pennsylvania law requires this.

The hearing examiner found that the student did possess a “penknife” in contravention of the school’s zero-tolerance policy. He observed that, under the circumstances, a one-year expulsion from school seemed unduly harsh “but concluded that he had no discretion to make an exception to the District’s policy and had no alternative but to recommend expulsion for one year.” Id. The school board adopted unanimously the hearing examiner’s recommendation of expulsion.

The student appealed to court, asserting that his substantive and procedural due process rights were violated by this procedure. The trial court, in ruling for the student and against the school board, noted that the school’s “zero tolerance policy,” although adopted by the school board by a voice vote, had never been reduced to writing. In addition, although the student signed a statement acknowledging the existence of the policy, the student’s parents had never been informed of the policy or that their child had signed such a statement. At 1074-75.

The trial court also found that the school's unwritten "zero tolerance policy" failed "to provide the superintendent with discretion to recommend a modification to the policy's one-year expulsion requirement for possession of a weapon," although this is also a requirement of Pennsylvania law. At 1075. The trial court found the district's "zero tolerance policy" was "null and void on its face and could not be constitutionally applied." *Id.* Even had the policy been properly drafted, the trial court added, "an exercise in discretion would have been warranted in this case." The uncontradicted evidence indicated that Lyons was an exemplary student, the knife was found by him at school, he never openly displayed the knife but merely used it to file a fingernail with the file contained in the penknife, and he turned it over willingly when asked to do so. The family was well educated and regularly attended church. "[T]his is not a family where the parents condone criminal activity on the part of their children, nor are the children the type who typically engage in that sort of activity." At 1075, *n.4*.

On appeal, the school board argued that its "zero tolerance policy" complied with state law, even though it conceded that it has no written "zero tolerance policy." It argued that, notwithstanding a written policy, state law "mandates that the Board expel a student who possesses a weapon on school property, and that its policy comports with the act's requirements." At 1075. The school board also argued that state law does not require the superintendent have the authority, on a case-by-case basis, to modify disciplinary actions by the school board. It also asserted that Lyons received a "fair and formal hearing" and that he had notice of the district's policy. It also argued that the implementation of its policy was a matter of its discretion, and the court should not interfere unless the school board's action was arbitrary or capricious. *Id.*

These arguments did not prove persuasive. The appellate court found the school board did not comply with state law when it failed to have a written policy regarding expulsion for possession of a weapon and when it failed to provide its superintendent with the discretion to modify certain disciplinary sanctions. "[T]he legislature expressly authorized the superintendent of each school district to recommend a modification of [mandatory expulsion] requirement on a case-by-case basis. Implicit in that grant of authority is a grant of permission to the Board to consider an alternative to expulsion based upon the recommendation of the District's superintendent." At 1076.

A school board, the appellate court added, cannot make rules outside its statutory authority. In this case, the court concluded that "the Board exceeded its authority in adopting its 'zero tolerance policy,' which denies the superintendent, the Board and the students the exercise of discretion specifically provided [by state law], and which frustrates the clear legislative intent that this statute not be blindly applied." *Id.* The trial court's decision was affirmed.

### ***Vagueness of Terms: Context and Content***

James P. v. Lemahieu, 84 F.Supp.2d 1113 (D. Hawai'i 2000) differs from the cases above in that the "zero tolerance" provision is a state statute and not a local school board policy. The statute reads in

relevant part:

Any child who is found to be in possession of a dangerous weapon, switchblade knife, intoxicating liquor, or illicit drug while attending school may be excluded from attending school for up to ninety-two school days, as determined by the principal and approved by the superintendent... In any case of exclusion from school, the due process procedures of the department...shall apply to any child who is alleged to be in possession of a dangerous weapon, switchblade knife, intoxicating liquor, or illicit drugs while attending school.... If a child is excluded from attending school, the superintendent or superintendent's designee shall ensure that substitute educational activities or other appropriate assistance are provided, such as referral for appropriate intervention and treatment services, as determined by the principal in consultation with the appropriate school staff.

At 1116. Although the court noted that there is marked disagreement between the plaintiffs and defendants regarding the facts in this case, there was sufficient information for the court to issue a preliminary injunction on behalf of the student. The student was a member of the school's cross country team. His senior class was having a school-sponsored luau at a local country club. Two of his friends were waiting at his house while he prepared to join them and go to the senior luau. During this period of time, his friends asked him for a shot glass, which he provided. The two friends then began to consume alcohol they found in the house. The plaintiff apparently did not join in this endeavor. At the luau, one of plaintiff's friends became ill while the other, visibly drunk, became something of a disruption. School officials questioned the three. The two friends admitted drinking, but plaintiff denied doing so. No disciplinary action was taken. In fact, all three boys were permitted to return to the luau. The following day, plaintiff participated in the state finals in cross country.

The following week, school officials conducted additional questioning. The two friends again admitted drinking alcohol, but this time implicated plaintiff, stating that he had been drinking rum. Plaintiff admitted giving them a shot glass but continued to deny that he had been consuming alcohol. Nevertheless, after the conclusion of the questioning and investigation, plaintiff was suspended from school for consuming alcohol. His parents were advised by the school principal that he was suspended for violating the school's "zero tolerance policy" as found in state statute. *Id.* When plaintiff's mother came to the school, the principal indicated that the plaintiff could be suspended for up to 92 days, but if the parent signed an agreement mandating the plaintiff complete drug and alcohol treatment, the suspension would be reduced to five (5) days. Both parents later met with the principal. Although there is disagreement as to whether the parents were issued an ultimatum or freely signed the agreement, it is undisputed that the parents consented to the agreement that their son receive counseling in exchange for a reduction of the suspension to five days. However, the suspension prohibited the plaintiff from making up any class work during the period of suspension, barred him from participating in any further athletic competition, and denied him consideration for any academic or athletic awards for which he might otherwise be eligible. In addition, the suspension would be included in his permanent record.

The plaintiff filed a civil rights action against the school district, alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and seeking injunctive relief. He alleged that if the injunction did not issue, he would suffer irreparable harm because he is applying for college and likely would secure an athletic scholarship. The suspension appearing in his educational record would “severely compromise his reputation and...affect his future scholastic and athletic endeavors.” At 1117.<sup>12</sup>

Plaintiff claimed the school district violated his due process rights in two ways: (1) It had no evidence that he violated the “zero tolerance policy”; and (2) If the “zero tolerance policy” does apply to plaintiff, its terms are too ambiguous to provide “fair notice” of what conduct is actually forbidden by the provisions, thus permitting arbitrary enforcement by school officials. At 1118.

The district court noted that due process concepts do require that one not be punished without evidence that he violated some law, and that a statute must clearly set forth what conduct is forbidden such that a reasonable person can conform his behavior to comply with these requirements. At 1118-19. Citing Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975), the court added that “children have a constitutional property interest in public education and a liberty interest in their reputation.” At 1118. These property and liberty interests are protected by the Due Process Clause and cannot be taken away or tarnished without adherence to the “minimal protections of the Due Process Clause” when suspensions are for an extended period of time and such disciplinary actions will be placed in the student’s permanent record. At 1119. “Consequently, students facing suspension from school must be given notice and afforded some kind of hearing before any punishment is invoked.” Id.<sup>13</sup>

The court noted that in administrative decisions where sanctions are available, there is still an “evidence of guilt” requirement. At 1120. In this case, the “zero tolerance policy” as found in the statute prohibits the “possession of...intoxicating liquor...while attending school.” School officials interpreted “possession” as including “consumption of alcohol” and that they had testimony from plaintiff’s friends that he consumed alcohol prior to the school luau. At 1120. The court disagreed.

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<sup>12</sup>The Court did not find any merit to the plaintiff’s Equal Protection Clause claim. This article will address only the Due Process claim.

<sup>13</sup>The court also noted that, unlike a right to public education and a liberty interest in one’s reputation, “a student has no constitutional right to participate in school athletic or social activities.” This principle is recognized in Indiana as well. See Haas v. South Bend Comm. Schs., 289 N.E.2d 495, 498 (Ind. 1972). Also see “IHSAA: ‘Fair Play,’ Student Eligibility, and the Case Review Panel,” **Quarterly Report** January-March: 2000.



Under these facts, it does not appear that Defendants have any evidence of a statutory violation since [the plaintiff] did not “possess intoxicating liquor...while attending school” even if he did drink liquor prior to the school event.... [Assuming the plaintiff did consume alcohol] at worst, [he] was guilty of being intoxicated at a school function, which is not covered by the statute unless “possession” is interpreted to include “present in the body.” This is an unlikely interpretation, especially since the context of the provision prohibits the possession of other tangible items, such as knives and weapons, items which cannot be consumed. If the state legislature had intended to prohibit being intoxicated at school events versus possessing and consuming liquor at these events, the statute as drafted simply fails to cover the activity.

Id. A “statute must clearly set out what conduct is prohibited by its provisions to provide notice to citizens and avoid arbitrary enforcement,” the court added. Id. In this case, the statute creates an ambiguity, evidenced by the differing interpretations of “possession” by the plaintiff and the defendants.

It is likely that a court would conclude that this statutory wording does not provide “fair notice” to students that they will be punished if they attend school functions after drinking elsewhere but not bring or consume liquor at the function. Also, it would encourage “arbitrary enforcement” to interpret the statute in this manner [interpreting “possession” as having alcohol “present in the body”] since it would allow the schools to interpret statutes freely, regardless of the content and context of the rest of the provision.

At 1121. The district court noted that it is not questioning the constitutionality of the “zero tolerance” statute but is questioning the “correct application” of its terms. Id. The court then enjoined the school district, permitting plaintiff to participate in track, make up any work missed during his suspension and receive credit, and not attend the counseling sessions; expunging the suspension from the plaintiff’s permanent record; and restoring his eligibility for any academic or athletic awards for which he may be eligible.

## **RELIGIOUS EXPRESSION BY TEACHERS IN THE CLASSROOM**

(Article by Valerie Hall, Legal Counsel)

More and more attention is being focused on religious expression by teachers in the classroom. To the individual teacher, the expression of personal religious beliefs in the classroom is viewed as a right of free speech and personal liberty. The public school, as a governmental entity, risks Establishment

Clause<sup>14</sup> violations if it turns a blind eye to a teacher's expression of his or her religious beliefs or practices in the classroom because a teacher's expression of religious beliefs can give the impression that the school is endorsing religion.<sup>15</sup> The courts have stated that religion concerns itself with the search for the ultimate truth. When a governmental entity encourages one version of ultimate truth over another belief, an Establishment Clause problem arises.

The cases in this annotation are separated and discussed under three headings. The first discusses cases where teachers have been terminated for bona fide reasons, and not their religious beliefs, although such beliefs were factually involved. The second category of cases, while involving the study of religion and culture, do not involve conduct having as its primary effect the advancement or hindrance of any religion. The final category of cases illustrates that government policies or actions must not foster excessive entanglement with religion.

### ***Dismissals for Legitimate, Bona Fide Reasons***

Several recent cases have upheld terminations of teachers who fail to follow lesson plans, fail to control their students, and fail to follow repeated warnings against injecting their religious beliefs into the classroom. In Helland v. South Bend Community School Corp., 93 F.3d 327 (7<sup>th</sup> Cir. 1996), a substitute teacher sued a school corporation for allegedly violating Title VII of the Civil Rights Act of

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<sup>14</sup> The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances."

<sup>15</sup> As will be noted, it is not always clear what views will be considered "religious." "Religion" is sometimes an elusive concept, defying precise definition. Although cases have indicated psychic phenomenon, telepathy, and various forms of mysticism may be religious in nature, merely placing "ism" as a suffix to a concept does not make the concept necessarily "religious." One court defined religion as the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." Peloza v. Capistrano Un. Sch. Dist., 37 F.3d 517, 521, n. 4 (9<sup>th</sup> Cir. 1994). The federal district court in Altman v. Bedford Cent. Sch. Dist., 45 F.Supp.2d 368, 378 (S.D.N.Y. 1999) adopted an emerging definition for "religion" for constitutional analysis. A religion "addresses fundamental and ultimate questions having to do with deep and imponderable matters." A religion also "is comprehensive in nature," consisting of "a belief system" as opposed to "an isolated teaching." Lastly, a religion "can be recognized by the presence of certain formal and external signs."

1964<sup>16</sup> and 42 U.S.C.A. §1983.<sup>17</sup> Several teachers complained that Helland proselytized in his classes by reading the Bible aloud to middle and high school students, distributing Biblical pamphlets, and professing his belief in the Biblical version of creation<sup>18</sup> in a fifth grade science class. Helland admitted that after he discussed “creationism,” he told the students that he could get into trouble for talking about the Bible in school. Accordingly, he agreed not to assign homework if the students would not tell anyone about the discussion. The school corporation removed him from the list of substitute teachers because he failed to follow lesson plans, failed to control his students, and improperly interjected religion in to his classrooms. The federal district court granted the school corporation’s motion for summary judgment on Helland’s Title VII and §1983 claims because it found that Helland did not prove that his dismissal was because of his religion. The school corporation’s reasons for removing him from the substitute teacher list were his unsatisfactory job performance based on his failure to follow lesson plans, as well as his defiance of repeated warnings against interjecting his religious beliefs into the classroom. These reasons were held to be legitimate, nondiscriminatory reasons for his removal from the substitute teacher list.

In Hennessy v. City of Melrose, 194 F.3d 237 (1<sup>st</sup> Cir. 1999), a student teacher in a Massachusetts public school who proselytized his anti-abortion views and frightened another teacher by showing her a picture of an aborted fetus alleged, *inter alia*, that his rights to free speech had been violated. The student teacher also stormed out of an art class where a painting was displayed that parodied a traditional rendition of the Last Supper by depicting Hollywood stars in lieu of Jesus Christ and the apostles. The student teacher termed the art display as “disgusting” and described the painting as “obscene.” He also refused to participate in a multicultural assembly called “Family Fiesta Night.” The student teacher failed his student teaching practicum due to the premature termination of his placement at the school. The Court of Appeals held that the public school’s “strong interest in preserving a collegial atmosphere, harmonious relations among teachers, and respect for the curriculum in the classroom” outweighed the student teacher’s interest in “proselytizing for his chosen cause.” At 247.

In Cowan v. Strafford R-VI School District, 140 F.3d 1153 (8<sup>th</sup> Cir. 1998), parents had complained to the school principal about a teacher’s presentation of a “magic rock” to each of her second-grade students. A “magic rock letter” was also sent home with the second graders that stated, in part: “To

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<sup>16</sup> Title VII of the Civil Rights Act of 1964 forbids discrimination in employment based on race, color, religion, sex, or national origin.

<sup>17</sup> An individual may file suit against any person who, “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,” has deprived that individual of “any rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. §1983.

<sup>18</sup> Literal belief in the creation of the world as contained in Genesis is often referred to as “creationism.” See “Evolution vs. ‘Creationism,’” **Quarterly Report** October-December: 1996.

make your rock work, close your eyes, rub it and say to yourself three times, 'I am a special and terrific person, with talents of my own!' . . . After you have put your rock away, you will know that the magic has worked." At 1156. The principal of the school informed the teacher that she had received complaints from parents and other members of the community who were concerned about "New Age infiltration of the schools." The school principal attended a program on "New Ageism" that was sponsored by local religious leaders in the community where accusations were made that the school was practicing anti-Christian, New Age teaching. The school principal told Cowan to "avoid magical ideas in her teaching." The teacher was also informed that improvement in her job performance was needed in "interpersonal relationships with parents and instructional process." The school board voted not to renew the teacher's contract. The teacher brought an action against the school district, alleging that the nonrenewal of her contract, following the "magic rock letter" incident, constituted religious discrimination in violation of Title VII of the Civil Rights Act of 1964. She also sued under §1983 for alleged constitutional violations of her First Amendment rights. The jury awarded \$18,000 in damages to the teacher on the Title VII religious discrimination claim, but the court did not order her reinstated to her teaching position. The jury also returned a verdict in her favor on the First Amendment, 42 U.S.C. §1983 claim, but did not award damages.

The school district appealed from the jury verdict awarding the \$18,000 in damages. The teacher appealed the district court's decision that denied her reinstatement to her teaching position. The 8<sup>th</sup> Circuit Court of Appeals found that the school principal's response to community concerns regarding "New Ageism" coupled with her unsupportive behavior toward Cowan provided sufficient evidence for the jury to conclude that the school principal was motivated by religious concerns. The 8<sup>th</sup> Circuit Court of Appeals affirmed the district court's decision and found that reinstatement was impracticable as the teacher-principal relationship was so badly damaged that it could not be reestablished and, without this working relationship, the school would not be able to function properly. At 1160.

The Cowan case must be analyzed under the "mixed motives" doctrine that states that if an employee first establishes that religion was a motivating factor in the employment decision, then the burden of persuasion shifts to the school board, who must then show that it would have made the same employment decision even in the absence of the illegal criteria (the teacher's religious beliefs). In this case, Cowan apparently ceased injecting her "magical ideas" into her teaching. This distinguishes the Cowan case from the previous two cases where the teachers failed to heed warnings and conform to teaching plans. Although the school board presented evidence that Cowan's teaching performance was poor, the court held that the jury could have discounted this evidence in view of other teachers' testimony.

### ***Permissible and Impermissible Studies of Religion***

Several recent cases have approved the study of comparative religions as part of a neutral, secular curriculum. These courts have approved guest lecturers discussing their beliefs as long as the caveat presented is "some people believe." Further, holy books such as the Bible or the Koran may be made

available in school libraries for student use. What is prohibited, however, is a teacher or school board taking an absolute position that the belief being espoused is the ultimate truth or advocating one belief over another. In such a case, the right to free speech is trumped by the Establishment Clause.

In Altman v. Bedford Cent. Sch. Dist., 45 F.Supp.2d 368 (S.D.N.Y. 1999), a fourth grade teacher's reading a story to a class on "How Ganesha Got His Elephant Head," for the purpose of educating students about Indian culture and society, did not violate the free exercise clause of the First Amendment; however, requiring the students to construct the likeness, in paper, of the Hindu deity's head was communicating a message of endorsing Lord Ganesha and the Hindu religion, which was considered to be coercive pressure that was impermissible.<sup>19</sup> The court found that the reading of the Ganesha story can be part of a neutral, secular curriculum, but there was no justification for telling young, impressionable students to construct images of a known religious god.<sup>20</sup> Constructing the image of a religious god has the appearance to a fourth grade child that the school is endorsing Lord Ganesha and the Hindu religion. Reading the life of Buddha was also held to be permissible in this context.

Altman had a myriad of issues and colorful characters: Worry Dolls; a Quetzal Bird; a self-proclaimed psychic; a man called "the Rock Hound"; and the promotion of Earth worship and prayer to the Earth.<sup>21</sup> Worry Dolls<sup>22</sup> were made and painted by fourth grade students under school sponsorship as

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<sup>19</sup> Ganesha (also Ganapati) is the god of wisdom and the remover of obstacles in the Hindu religion. He is often portrayed as a one-tusked, elephant-headed deity.

<sup>20</sup> The Indiana State Board of Education's (SBOE's) rules would permit the study of comparative religions in the social studies of world cultures and in the study of literature. See 511 IAC 6.1-5-2.5, which outlines elementary school curriculum, and 511 IAC 6.1-5-3.5, which outlines middle school curriculum. The SBOE's rule would permit the study of Biblical literature at a high school level. See 511 IAC 6.1-5.1-2. I.C. 20-10.1-4-2.5(e) allows a student to include a reference to a writing, document, or record listed in I.C. 20-10.1-4-2.5(a) in a report or other work product. These writings are as follows: the Constitution of the United States of America; the national motto; the national anthem; the Pledge of Allegiance; the Constitution of the State of Indiana; the Declaration of Independence; the Mayflower Compact; the Federalist Papers; "Common Sense" by Thomas Paine; the writings, speeches, documents, and proclamations of the founding fathers and presidents of the United States; United States Supreme Court decisions; Executive Orders of presidents of the United States; Frederick Douglass' Speech at Rochester, New York, on July 5, 1852, entitled "What to a Slave is the Fourth of July?"; *Appeal* by David Walker; and Chief Seattle's letter to the United States government in 1852 in response to the United States government's inquiry regarding the purchase of tribal lands.

<sup>21</sup> Altman actually involves a "laundry list" of purported First Amendment violations, most addressed in this article. Other issues not addressed include the role-playing card game "Magic S The Gathering"; a teacher reading about the life of Buddha; students being permitted to write poems, including one entitled "God Messed Up"; a cemetery visit as part of an overnight experience for fourth

projects at an elementary school, and then were sold in the school store. Fourth grade students were told that if they put the dolls under their pillows at night, the dolls would chase away bad dreams and worries. The court found that the Worry Dolls' project was an example of teaching superstition to children of a young and impressionable age. The court held that the sponsorship by the school of Worry Dolls was a violation of the First Amendment as it preferred superstition over religion.

Reading a story about Quetzalcoatl was part of a historical presentation on Mexico. One student made a Quetzal Bird from cardboard, paper and pipe cleaners, and a diorama was made showing human sacrifice by the Aztecs.<sup>23</sup> The court concluded that no student was compelled to make a physical representation of Quetzalcoatl and that the teaching was consistent with the New York State curriculum. Quetzalcoatl, unlike Lord Ganesha, was not currently worshiped in the world; displaying the Quetzal Bird in class would not be regarded as the adoption of a religious symbol. Reading a story about Quetzalcoatl did not violate the First Amendment and was permissible.

A minister in the Life Spirit Congregational Church, who was a self-proclaimed psychic, was invited by a teacher to conduct activities at the elementary schools that were intended to improve the function of the "right hemisphere" of the brain. The children participated in exercises that included drawing with their non-dominant hand while their eyes were closed. There was no evidence that the minister taught religion, performed intuitive counseling, exercised psychic powers, or engaged in telepathy at the school. The minister's appearance at the school was the "result of a random act" by a teacher and did not involve decision-making by the superintendent, principal, or the local board of education. The court found that this did not rise to the level of a First Amendment violation.

A man called "the Rock Hound" was invited to speak to students as a result of a random act by another teacher. The parents and guardians of the students alleged that elementary school students were told by the "Rock Hound" that crystals (rocks) had supernatural powers and could affect their mental state and heart rate. Plaintiffs also alleged that this activity constituted a fostering by the school district of superstition and idolatry in violation of plaintiffs' rights under the Establishment Clause. The court found that the plaintiffs failed to prove that the lecture went beyond telling the students that "some people

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grade students; the Drug Abuse Resistance Education (DARE) program; peer facilitated programs; and "non-yoga meditation programs." The parents and guardians believed the school district was hostile to religion, specifically the Christian religion; espoused other religious beliefs; and engaged in invasion of the privacy of the family relationship.

<sup>22</sup> The Worry Dolls were 1¼ inches high and made out of toothpicks, thread, wire, and painted in bright colors. They were put together with glue, with a painted face.

<sup>23</sup> Quetzalcoatl, usually presented as a feathered serpent, was one of the more powerful and complex gods in the Aztec culture. The Aztecs attributed to him the creation of agriculture and the calendar.

believe” that crystals have powers. The court held that it would have been a violation of the First Amendment if the visiting lecturer had taught the students that the crystals have occult or supernatural power.<sup>24</sup>

The school district’s promotion of Earth worship and prayer to the Earth violated the First Amendment. Plaintiffs were entitled to an injunction that would: (1) prevent school sponsorship of worship of the Earth or presentation of a liturgy addressed to the Earth as if it were the Creator, or divine, including prayers of any kind to the Earth, even if they were derived from the culture of American Indians; (2) remove the Worry Dolls from the school system and refrain from sponsoring charms or suggesting that tangibles have supernatural powers; (3) prohibit any direction to a student to make a likeness or a graven image of a god or religious symbol; and (4) direct the adoption of a published policy that would contain clear instructions to teachers and others to implement within the school system the U.S. Supreme Court standards in order that the school district shall remain neutral towards all religions, neither sponsoring nor disparaging any religious belief, and shall not coerce any student to participate in religion or its exercise or to violate any religious precept held by a child or his or her parents.<sup>25</sup> The policy shall provide that persons teaching students, who are not regular members of the faculty — such as psychics, yogis, and rock hounds — shall be informed of these limitations before being invited. Altman at 397-398.

In Malnak v. Yogi, 592 F.2d 197 (3<sup>rd</sup> Cir. 1979), the teaching of a course called the Science of Creative Intelligence—Transcendental Meditation (SCI/TM) at five New Jersey public high schools during the 1975-76 school year was held to be a religious activity and constituted an establishment of religion in violation of the First Amendment of the United States Constitution. The course was an elective and was taught four or five days a week by teachers who had been trained by the World Plan Executive Council of the United States, whose goal was to disseminate the teachings of SCI/TM throughout the United States. The textbook used in the course was developed by Maharishi Mahesh

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<sup>24</sup> A recent controversy involved a substitute teacher at Greenwood (IN) Community School Corporation who gave a note to fourth grade students on “how to become a witch.” This was reported in the *Indianapolis Star* on September 16, 2000. The substitute teacher was fired, and the local superintendent has reportedly told the *Indianapolis Star* that “[i]t’s not a rampant, infectious thing going on in Greenwood schools . . . there were six notes, and to our knowledge maybe one or two of them went home.” The local superintendent reportedly refused to identify the fired substitute and would not say what tips the teacher suggested.

<sup>25</sup> Incorporating U.S. Supreme Court standards or “guidelines” has been criticized by several legal commentaries, principally because: (1) there are no “guidelines” or standards as such; and (2) members of the Supreme Court disagree among themselves as to what elements of their previous decisions should be considered as having general applicability.

Yogi, the founder of the Science of Creative Intelligence.<sup>26</sup> As part of the practice of Transcendental Meditation, each mediator has his own personal “mantra” that is never to be revealed to any other person.<sup>27</sup> To obtain a mantra, a mediator must attend a ceremony called a “puja.” A puja was performed by the teacher for each student and conducted off school premises on a Sunday. During the puja, the student made offerings of fruit or flowers to a deified “Guru Dev.” The Court of Appeals found that SCI/TM is a religion because it concerns itself with the search for ultimate truth just like other religions. “When the government seeks to encourage this version of ultimate truth, and not others, an establishment clause problem arises.” At 214.

In Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9<sup>th</sup> Cir. 1994), discussed in the next section of this annotation, the court upheld earlier precedent that “evolutionism” and “secular humanism” are not “religions” for Establishment Clause purposes.<sup>28</sup> Also in Roberts v. Madigan, 921 F.2d 1047 (10<sup>th</sup> Cir. 1990), cert. den., 505 U.S. 1218, 112 S. Ct. 3025 (1992), the court held that having a Bible in the school library is not a violation of the Establishment Clause. This case is also discussed below.

### ***State Policies Prevent Fostering Excessive Entanglement with Religion***

In Marchi v. Bd. of Cooperative Educational Services, 173 F.3d 469 (2<sup>nd</sup> Cir. 1999), a special education teacher who experienced a dramatic conversion to Christianity shared this experience with his students and modified his instructional program to discuss forgiveness and reconciliation. The Director of the Board of Cooperative Educational Services (BOCES) issued a “cease and desist” letter, directing the teacher to refrain from using religion as part of his instructional program. He refused to follow the directive because to do so “would be detrimental to his students” and “would violate his conscience before God.” He was suspended indefinitely for violating the directive. Following a hearing, he agreed to adhere to the directive. Subsequently, he wrote a letter to the parent of a student that contained references to religion. His supervisor advised him that the agreement he signed “. . . precludes you from communicating in this manner. . .,” but no further action was taken against him with regards to this incident. The teacher brought an action under 42 U.S.C. §1983, alleging that the BOCES violated his rights to academic freedom, free association, free speech, and free exercise of religion.

The federal district court entered summary judgment for the BOCES. On appeal, the 2<sup>nd</sup> Circuit Court of Appeals addressed the issue of whether the BOCES’ attempt to avoid the Establishment Clause

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<sup>26</sup> It teaches that “creative intelligence” is the basis of life, and that through the process of Transcendental Meditation, students can perceive the full potential of their lives.

<sup>27</sup> A mantra is an incantation, charm, spell or chant that is either a mystical verse from Indian scripture or has some special significance.

<sup>28</sup> Peloza is the case where the court states that adding “ism” does not necessarily change the meaning nor change a concept into religion. 37 F.3d at 521.



violations, by restricting the religious expression of the teacher, infringed upon the teacher's Free Exercise rights. The 2<sup>nd</sup> Circuit Court of Appeals held the directive that the teacher refrain from using religion as part of his instructional program was not impermissibly vague nor overbroad and did not infringe on the teacher's Free Exercise rights.

In Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9<sup>th</sup> Cir. 1994), a high school biology teacher brought an action against a school district challenging its requirement that he teach "evolutionism." He claimed that "evolutionism" was a religious belief. The teacher also challenged the school's order barring him from discussing his religious beliefs with students. The 9<sup>th</sup> Circuit Court of Appeals held that the teacher failed to state a claim for violation of the Establishment Clause of the First Amendment because neither the United States Supreme Court nor the 9<sup>th</sup> Circuit has ever held that "evolutionism" or "secular humanism" are "religions" for Establishment Clause purposes. The United States Supreme Court has held that the scientific theory that higher forms of life evolved from lower forms of life is not a religious belief, whereas "belief in a divine creator of the universe" is a religious belief. Edwards v. Aquillard, 482 U.S. 578, 107 S.Ct. 2578, 96 L.Ed.2d 510 (1987) (addressing "creation science" or "creationism" as a particular religious belief).

The Circuit Court of Appeals also held that the school's restriction on the teacher's ability to talk with students about religion during "instructional time" was justified where there is a compelling governmental interest in avoiding a violation of the constitution. To permit the teacher to discuss his religious beliefs during the school day would violate the Establishment Clause of the First Amendment. "The school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech." At 522. The Court of Appeals found that "whether . . . in the classroom or outside of it during contract time, Peloza is not just an ordinary citizen. He is a teacher." Because he is in the respected position of a teacher, the likelihood of the students equating his views with those of the school was substantial. His speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. It would flunk all three parts of the *Lemon v. Kurtzman* test.<sup>29</sup> Id.

In Breen v. Runkel, 614 F.Supp. 355 (W.D. Mich. 1985), teachers, students, and parents of students filed suit against Michigan's Superintendent of Public Instruction asserting that the superintendent had directed the school board and school administrators to stop religious practice in violation of their rights under the First Amendment of the United States Constitution. The teachers prayed in the classroom, read from the Bible, and told Biblical stories. Classroom teachers were held to be "state actors" because "local school boards are creatures of the state and are controlled by state law." The state

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<sup>29</sup> Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Establishment Clause jurisprudence provides that, in addition to having a secular purpose and not having the primary effect of advancing or hindering religion, state policies or actions must not foster excessive government entanglement with religion. See Lemon at 612-13.

Superintendent of Public Instruction had an affirmative duty to ensure that individual teachers did not, through their classroom conduct, violate the Establishment Clause. At 358. The Establishment Clause limitations placed on public school was found to outweigh whatever free speech or free exercise claims that the individual teachers asserted. The conduct of the teachers, therefore, violated the Establishment Clause of the U.S. Constitution. At 360.

In Roberts v. Madigan, 921 F.2d 1047 (10<sup>th</sup> Cir. 1990), cert. den., 505 U.S. 1218, 112 S.Ct. 3025 (1992), a teacher claimed that a school district violated the Establishment Clause by: (1) removing *The Bible in Pictures* and *The Story of Jesus* from his classroom library; (2) ordering him not to read his Bible in the classroom during school hours; (3) ordering him to keep his Bible off his desk during school hours; and (4) removing the Bible from the school library. The trial court ordered the school district to return the Bible to the school library. The district court held that with the exception of removing the Bible from the school library, the school district had not violated the Establishment Clause. On appeal, the Court of Appeals upheld the decision of the district court, noting that avoiding First Amendment church-state entanglements is a “secular purpose” and does not constitute active disapproval of religion. At 1054.

In Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7<sup>th</sup> Cir. 1990), a Junior High School teacher was instructed by the school that he could not teach “creation science,” because the teaching of this theory had been held to be religious advocacy.<sup>30</sup> The teacher argued the school district violated his First Amendment right by prohibiting him from teaching a nonevolutionary theory of creation. The district court found that the teacher did not have a First Amendment right to teach creation science in a public school. The Seventh Circuit upheld the school’s decision to prohibit the teacher from teaching “creation science” because this was religious advocacy. The First Amendment is “not a teacher license for uncontrolled expression at variance with established curricular content.” At 1007, quoting Palmer v. Bd. of Ed., 603 F.2d 1271, 1273 (7<sup>th</sup> Cir. 1979), cert. den., 444 U.S. 1026, 100 S.Ct. 689 (1980).

The 7<sup>th</sup> Circuit added that school boards do not have unfettered discretion to “fire teachers for random classroom comments” nor can school boards “require instruction in a religiously inspired dogma to the exclusion of other points of view.” Id. In this case, given Webster’s religious advocacy, “the school board has successfully navigated the narrow channel between impairing intellectual inquiry and propagating a religious creed.” At 1008.

## **PERFORMANCE STANDARDS AND MEASUREMENTS FOR SCHOOL BUS DRIVERS**

(Article by Dana L. Long, Legal Counsel)

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<sup>30</sup> In Edwards v. Aguillard, 482 U.S.578, 592, 107 S.Ct. 2578 (1987), the U.S. Supreme Court determined that creation science was a nonevolutionary theory of origin that “embodies the religious belief that a supernatural creator was responsible for the creation of humankind.”

The State School Bus Committee<sup>31</sup> is the entity designated by the Indiana General Assembly to prescribe rules concerning standards for the construction, equipment, safety, and inspection of school buses.<sup>32</sup> Prior to 1998, the State School Bus Committee (SSBC) had no responsibility for determining the qualifications for school bus drivers. Such qualifications were specified by statute.<sup>33</sup> The Indiana General Assembly, through P.L. 54-1998, amended I.C. 20-9.1-3-1 and I.C. 20-9.1-4-4, giving the SSBC specific responsibility to determine what constitutes “sufficient physical ability to be a school bus driver,” I.C. 20-9.1-3-1(a)(7)(A), and to adopt rules “to prescribe performance standards and measurements for determining the physical ability necessary for a person to be a school bus driver.” (I.C. 20-9.1-4-4.) Although related, the physical ability to be a school bus driver and the performance standards and measurements are separate matters.

The physical ability to be a school bus driver, to be determined by the SSBC pursuant to I.C. 20-9.1-3-1(a)(7)(A), refers to a physical ability that can be measured or determined by a physician during a physical examination. I.C. 20-9.1-3-2 requires every school bus driver to obtain a certificate that he or she possesses the physical characteristics required by section 1(g). Section 1(g), set forth in footnote 3, is the predecessor to I.C. 20-9.1-3-1(a)(7). The latter now provides:

(a) A person may not drive a school bus for the transportation of school children or be employed as

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<sup>31</sup>I.C. 20-9.1-4-1.

<sup>32</sup>The regulations of the State School Bus Committee are found at 575 IAC 1-1 *et seq.*

<sup>33</sup>Prior to 1998, I.C. 20-9.1-3-1 provided:

A person may not drive a school bus for the transportation of school children unless the person satisfies the following requirements:

- (a) is of good moral character;
- (b) does not use intoxicating liquor during school hours;
- (c) does not use intoxicating liquor to excess at any time;
- (d) is not addicted to any narcotic drug;
- (e) is at least twenty-one (21) years of age;
- (f) holds a valid public passenger chauffeur’s license issued by the state of Indiana or any other state; and
- (g) possesses the following required physical characteristics:
  - (1) sufficient physical ability to drive a school bus;
  - (2) possession and full normal use of both hands, both arms, both feet, both legs, both eyes, and both ears;
  - (3) freedom from any communicable disease;
  - (4) freedom from any mental, nervous, organic, or functional disease which might impair the person’s ability to properly operate a school bus; and
  - (5) visual acuity, with or without glasses, of at least 20/40 in each eye and a field of vision with 150 degree minimum and with depth perception of at least 80%.

a school bus monitor unless the person satisfies the following requirements: . . .

- (7) Possesses the following required physical characteristics:
  - (A) Sufficient physical ability to be a school bus driver, as determined by the state school bus committee (I.C. 20-9.1-4-1).
  - (B) Possession and full normal use of both hands, both arms, both feet, both legs, both eyes, and both ears.
  - (C) Freedom from any communicable disease that:
    - (i) may be transmitted through airborne or droplet means; or
    - (ii) requires isolation of the infected person under 410 IAC 1-2.1.
  - (D) Freedom from any mental, nervous, organic, or functional disease which might impair the person's ability to properly operate a school bus.
  - (E) Visual acuity, with or without glasses, of at least 20/40 in each eye and a field of vision with 150 degree minimum and with depth perception of at least 80%.

### **Nondiscrimination on the Basis of Disability**

Performance standards and measurements, on the other hand, when used as selection criteria for employment, must be based upon the essential functions of the job and safety considerations. Physical performance standards and measurements need to be in compliance with the Americans with Disabilities Act (ADA)<sup>34</sup> and Section 504 of the Rehabilitation Act of 1973,<sup>35</sup> both federal nondiscrimination laws, as well as I.C. 22-9-5 *et seq.*, Indiana's Employment Discrimination Against Disabled Persons Act.<sup>36</sup> These laws generally prohibit discrimination on the basis of disability against a qualified individual with a disability.

For purposes of the ADA, "disability" means, with respect to an individual:

- (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (2) A record of such an impairment; or
- (3) Being regarded as having such an impairment.

29 CFR § 1630.2(g).

29 CFR § 1630.2(h) defines "physical or mental impairment" as follows:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting

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<sup>34</sup>42 U.S.C. § 12116 *et seq.*, as implemented through 29 CFR § 1630.

<sup>35</sup>29 U.S.C. § 794.

<sup>36</sup>For purposes of this article, reference will generally be made to the requirements of the ADA, as all three nondiscrimination laws contain similar provisions pertaining to nondiscrimination of individuals with disabilities in the area of employment.

one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

It is equally important to be aware of what is not included in the definition of disability. Individuals currently engaged in the illegal use of drugs are not covered under the ADA.<sup>37</sup> Also, “disability” does not include: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs. Homosexuality and bisexuality are not impairments and are therefore not considered disabilities. 29 CFR §1630.3(d).

To constitute a disability, there must be both an impairment and a substantial limitation of a major life activity. 29 CFR §1630.2(g). Further guidance is provided by the Equal Employment Opportunity Commission (EEOC), the federal entity responsible for enforcing Title I of the ADA. In Appendix A to Title I of the ADA, the EEOC notes the importance of distinguishing between conditions that are impairments and physical, cultural, psychological, environmental and economic characteristics that are not impairments constituting a disability under the ADA. “Impairment” does not include characteristics such as eye and hair color, left-handedness, height, weight or muscle tone that are within “normal” range and are not the result of a physiological condition. “Impairment” also does not include a predisposition to illness or disease. Environmental, cultural, or economic disadvantages (e.g., poverty, lack of education, prison record) are not impairments. Advanced age, in and of itself, is not an impairment. However, loss of hearing, osteoporosis, or other medical conditions associated with age would constitute impairments. Appendix A, *Sec. 1630.2(h)*.

The existence of an impairment is only the first step in determining whether an individual is disabled. An impairment will rise to the level of a disability if the impairment substantially limits one or more of the individual’s major life activities. Temporary, non-chronic impairments of short duration (e.g., broken limbs, sprained joints, appendicitis, influenza), with little or no long-term impact, are usually not disabilities. Similarly, obesity is not considered a disabling impairment except in rare circumstances. An impairment is “substantially limiting” if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population’s ability to perform that same major life activity. Appendix A, *Sec. 1630.2(j)*.

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<sup>37</sup>However, the terms “disability” and “qualified individual with a disability” may not exclude an individual who has successfully completed a drug rehabilitation program, is participating in a rehabilitation program, or is erroneously regarded as engaging in such use, and is not currently engaging in the illegal use of drugs. 29 CFR §1630.3(b).

An individual with a disability must be “qualified” in order to invoke the protections of the ADA. A “qualified individual with a disability” is “an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.” 29 CFR §1630.2(m).

“Essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires.” 29 CFR §1630.2(n). Evidence as to whether a function is essential includes the employer’s judgment, written job descriptions, the amount of time spent performing the function, the consequences of not requiring the individual to perform the function, the terms of a collective bargaining agreement, the work experience of past incumbents, and the current work experience of incumbents in similar jobs. 29 CFR §1630.2(n)

Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired. 29 CFR §1630.2(q).

A “‘qualification standard’ may also include a requirement that an individual not pose a direct threat to the health or safety of the individual or others in the workplace.” 29 CFR §1630.15.

“Direct threat” is defined at 29 CFR §1630.2(r):

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- A. The duration of the risk;
- B. The nature and severity of the potential harm;
- C. The likelihood that the potential harm will occur; and
- D. The imminence of the potential harm.

Similarly, Indiana defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” I.C. 22-9-5-5. Appendix A to Title I of the ADA contains interpretive guidance by the EEOC, which emphasizes that “direct threat” involves a significant risk, i.e., where there is a high probability of substantial harm. A slightly increased risk, or a

speculative or remote risk, is insufficient to deny employment. A qualification standard that an individual not pose a direct threat must apply to all applicants, not just those with a disability. Appendix A, *Sec. 1630.2(r)*. If an employer determines an individual with a physical disability is a direct threat to the health or safety of himself/herself or others, the employer must identify the specific risk posed by the individual and also identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors set forth in 29 CFR §1630.2(r) (the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm). This consideration must rely upon objective, factual evidence, and not on subjective perceptions, irrational fears or stereotypes. *Id.*

It is unlawful . . . to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, . . . is shown to be job-related for the position in question and is consistent with business necessity.

29 CFR §1630.10. See also 29 CFR §1630.7 (standards, criteria, or methods of administration) and 29 CFR §1630.11 (administration of tests).

The inquiry does not end just because an employer may determine an individual would pose a direct threat to the health or safety or others. The second part of the inquiry requires a determination as to whether the direct threat can be reduced or eliminated by reasonable accommodation. Reasonable accommodations include making existing facilities accessible to individuals with disabilities; job restructuring; acquisition or modifications of equipment or devices; or adjustment or modifications of examinations that would enable an applicant with a disability to be considered for a position. 29 CFR §1630.2(o).

### **Case Law: Essential Functions, Performance Standards, Direct Threat, and Accommodations**

Regulatory definitions and interpretive guidance are certainly helpful, but judicial application of these terms provides a better understanding of how such concepts will be employed within the public school context. The following cases are representative.

The school district did not violate the ADA when it refused to hire an individual with a back disorder for a position as a bus attendant on a school bus that transported children with disabilities. Lifting was determined to be an essential function for the position, and an applicant who could not lift was not qualified for the position. The ADA did not require the school district assign the applicant to a bus serving children with minimal physical disabilities, as the ADA does not require employers to exempt employees from performing the essential functions of the job. Brickers v. Cleveland Board of Education, 145 F.3d 846 (6<sup>th</sup> Cir. 1998).

The issue of “reasonable accommodation” was addressed by the federal district court in Salmon v.

Dade County School Board, 4 F.Supp.2d 1157 (S.D.Fla. 1998). This case involved a guidance counselor with a back disorder. To accommodate the counselor's disorder, the school reassigned her responsibilities so that she would not have to climb stairs and provided her with a special chair. The counselor wanted to arrive at school late every day so that she could avoid traffic. The school denied her request, as she was the only counselor in the school and needed to be present when the students were at school. In upholding the school's determination, the court stated "the duty to accommodate does not require an employer to lower its performance standards, reallocate essential job functions, create new jobs, or reassign disabled employees to positions that are already occupied." At 1162. Further, the court determined that the commute to work is an activity that is unrelated to and outside of her job, and that the employer is not required to eliminate barriers outside the work environment. At 1163.

In Weatherbee v. Indiana Civil Rights Commission, 665 N.E.2d 945 (Ind.App. 1996), the Indiana Court of Appeals addressed "direct threat" in the context of a school bus driver. In this case, Weatherbee had submitted the lowest bid for a bus route, but the bid was rejected as Weatherbee's application noted she had been hospitalized and was on medication for seizures. The school corporation determined Weatherbee's medical condition may reasonably be an impairment to properly and safely drive a school bus. Weatherbee filed a complaint with the Indiana Civil Rights Commission, which found the school corporation discriminated against Weatherbee. The school corporation appealed, and the trial court reversed the determination of the Indiana Civil Rights Commission. In upholding the trial court, the Court of Appeals noted that the awarding of school bus contracts requires the exercise of discretion or judgment in determining the lowest responsible bidder. The school "had a duty to consider not only Weatherbee's rights but also its own responsibility to provide safe transportation for school children and to preserve the confidence of parents and the public in the school's transportation system." At 949. The court noted that whether a person with a disability can safely perform a job involves a case-by-case analysis, and the court was not holding that all persons with epilepsy are *per se* incapable of operating a school bus safely. At 950. In this case, the school's decision not to award the contract to Weatherbee was based upon a nondiscriminatory motive. Weatherbee's application failed to establish that her epilepsy was under control and that, with medication, she was reliably asymptomatic. Id.

The Sixth Circuit Court of Appeals recently determined that an individual with a record of drinking on the job may pose a serious risk to school children if employed as a school bus driver. In Martin v. Barnesville Exempted Village School District Bd. of Education, 209 F.3d 931 (6<sup>th</sup> Cir. 2000), Martin claimed the school district discriminated against him in violation of the ADA because the district regarded him as having alcohol dependency. Martin originally had been hired by the district as a bus driver in 1984, but in 1991 he successfully bid for a position as custodian. He was later observed drinking beer while working at an elementary school. As a result of that incident, he entered into a "last



chance” agreement with the district that permitted him to keep his job.<sup>38</sup> In 1994, he submitted a bid for a part-time bus driver position and part-time garage worker position. The district rejected his bid due to the 1991 beer-drinking incident.

In addressing Martin’s claim of discrimination<sup>39</sup> the 6<sup>th</sup> Circuit explained that to establish a prima facie case of discrimination, a plaintiff must show:

(1) he was “disabled” under the ADA; (2) he was otherwise qualified to perform the essential functions of the job; (3) he suffered an adverse employment action; and (4) a nondisabled person replaced him. . . . Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts back to plaintiff to demonstrate that the employer’s stated reason is a pretext for discrimination. (Citations omitted.) *Id.*, at 934.

The court assumed, without deciding, that the school district perceived that Martin suffered from alcoholism, a disability, and that Martin established a prima facie case of disability. The court then examined the school district’s stated reason for rejecting Martin’s bids. The district indicated that Martin was denied the jobs as a bus driver and garage worker based on the 1991 beer drinking incident at an elementary school.

The ADA does not protect plaintiff from his own bad judgment in drinking on the job. The plaintiff cannot force defendant to hire him as a school bus driver when there is a serious risk that he may again drink on the job, have an accident and kill a group of school children. Any suggestion to the contrary is absurd on its face. For a federal court to interpret the ADA to require a school board to hire as a school bus driver a person guilty of drinking on the job and thereby run the risk of an accident would raise serious constitutional problems. If an accident should occur and students were injured or killed, the school board would be subject to large compensatory and punitive damages and open itself to the moral condemnation of the community. *Id.*, at 935.

In Wood v. Omaha School District, 25 F.3d 667 (8<sup>th</sup> Cir. 1994), the court addressed the qualifications of Type II insulin-using diabetics for the position of van or bus drivers. When the state adopted the Department of Transportation guidelines for over-the-road truck drivers, insulin-dependent diabetics were prohibited from driving school buses or vans. Two insulin-dependent diabetic van drivers were demoted to aides. The court found them not to be “otherwise qualified” because insulin-using diabetics

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<sup>38</sup>There is no dispute that at all times Martin complied with the terms of this agreement.

<sup>39</sup>An arbitrator awarded Martin the positions he sought. After the school district exhausted its appeals through the state courts, Martin began his duties as bus driver and garage worker in February, 1998. The issue of whether Martin should be awarded the positions he sought was therefore moot, and the 6<sup>th</sup> Circuit Court only addressed the issue of whether he should be awarded compensatory and punitive damages due to the school district’s alleged discrimination.

have an appreciable risk for developing hypoglycemia, the symptoms of hypoglycemia or complications from hypoglycemia, which may occur without warning and create a sudden and unexpected loss of vision, blurred vision, or loss of consciousness. The court determined there was no reasonable accommodation that would obviate the dangers of an insulin-using diabetic driving a school bus or van. At 669.

In U.S. v. New York State Department of Motor Vehicles, 82 F.Supp.2d 42 (E.D.N.Y. 2000), an action was brought under the ADA based upon the refusal of Amboy Bus Company (Amboy)<sup>40</sup> to hire Bacalakis as a school bus driver due to state regulations that prohibited the operation of a bus by any individual missing a limb. Bacalakis began working as a school bus driver for Amboy in 1986. In 1991, he was injured while off-duty and lost his left leg below the knee. He was fitted with a prosthesis and underwent extensive rehabilitation such that by May, 1993, he was able to resume his duties. However, he was told by Amboy that due to state regulations, he was no longer qualified to drive a bus in New York.<sup>41</sup> The U.S. sued the state agencies and local school district for violations of the ADA. All parties moved for summary judgment.

The defendants in this case included the Department of Motor Vehicles (DMV) and the Department of Education (SED) as well as the local school district. Both the DMV and the SED had regulations that required a bus driver to possess both feet, legs, hands and arms.<sup>42</sup> The defendants argued that they

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<sup>40</sup>Amboy contracted with the local school district to provide bus drivers. The contract incorporated state regulations as to the qualifications of the bus drivers.

<sup>41</sup>This case was actually the second of two cases arising out of the same facts. In the first case, EEOC v. Amboy Bus Co., 96-CV-5451, the court determined that Amboy, despite its good faith adherence to the state regulations, was liable for violating the ADA.

<sup>42</sup>For example, the Department of Motor Vehicles regulation in place at the time provided: A person is physically qualified to drive a bus if he or she has no loss of a foot, a leg, a hand or an arm, except that if a person has been employed by a motor carrier and has suffered a loss of a foot, leg, hand or an arm prior to the biennial physical examination of July of 1978 and he or she has demonstrated an ability to safely operate a bus, he or she may be deemed to be physically qualified in spite of such loss.

Adherence to this regulation prevents a case-by-case determination as to whether, despite the loss of a foot, leg, hand, or arm, an individual is “otherwise qualified” for the position of bus driver and can safely perform the essential functions of the position.

Indiana’s statutory requirement for school bus driver contains similar provisions that prevent a case-by-case determination as to whether an individual is “otherwise qualified”:

(a) A person may not drive a school bus for the transportation of school children or be employed as

were not “covered entities” under the ADA. To be covered under the ADA, the defendants would have to be employers. The court analyzed the relationship of each of the defendants to Bacalakis. The court first determined that even if a defendant does not have a direct employment relationship with the applicant, it may be liable for discriminatory acts if it interferes with the applicant’s employment opportunities with a third party. At 46. The contract between Amboy and the school district gave the school district sufficient control over Bacalakis’ employment to be liable for any discriminatory acts on the school district’s part. However, the evidence in the case established that Amboy’s decision not to hire Bacalakis was based upon DMV regulations and not upon its contract with the district. There was no discriminatory action on the part of the district. At 53.

The state agencies first argued that the Supremacy Clause of the U.S. Constitution gives the ADA precedence over conflicting state regulations. While agreeing that the ADA took precedence, the court was reluctant to accept the proposition that the illegality of the state’s regulations inoculates it against liability.<sup>43</sup> At 49. However, the court accepted the state agencies’ arguments that any interference on their part in the employment of Bacalakis did not bring them under the definition of “employer” because they were acting in their regulatory capacity. A state agency cannot be considered an employer within the meaning of the ADA when it is acting pursuant to its police power. At 52.

A school bus driver brought an action against the state Superintendent of Public Instruction due to the Michigan Department of Education’s (DOE) refusal to grant him a waiver to drive a school bus because he had lost his left leg below the knee. Porter v. Ellis, 117 F.Supp. 651 (W.D.Mich. 2000). Porter had all of the required licenses and waivers for driving a school bus with his disability except a school bus endorsement/waiver through the Michigan DOE. He brought an action in federal district court claiming a violation of 42 U.S.C. §1983 by discriminating against him in violation of the ADA, as well as a violation of his 14<sup>th</sup> Amendment equal protection rights. In granting the Superintendent of Public Instruction’s motion for a dismissal, the district court first found that there was no cause of action under the ADA because the defendant was not the plaintiff’s employer. Further, bringing the action under §1983 would not create a cause of action where one did not exist under the ADA itself.<sup>44</sup>

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a school bus monitor unless the person satisfies the following requirements:

(7) Possesses the following required physical characteristics:

(B) Possession and full normal use of both hands, both arms, both feet, both legs, both eyes, and both ears.

I.C. 20-9.1-3-1(a)(7)(B).

<sup>43</sup>Both state agencies have amended their regulations since the commencement of this action to comply with the ADA. Amboy reinstated Bacalakis within a week of the amendment of the regulations.

<sup>44</sup>Although the plaintiff had not stated a claim for which relief could be granted in federal court, the court noted that this decision did not affect plaintiff’s ability to litigate against the state’s refusal to grant a waiver in the state courts.

The court then addressed the equal protection claim. The court indicated it would apply a rational basis test, as it “is well established that disability is not a suspect class for purposes of equal protection analysis.” (Citations omitted.) At 653. The court found at 654 that the defendant supplied a rational relationship to a legitimate state interest:

[A] rational basis exists to support distinctions between individuals with a limb and those who use a prosthetic device. There is more to driving a school bus than simply driving a vehicle. Certain physical actions may be required by a school bus driver such as evacuating school children from a school bus in the event of a fire, medical emergency, or evacuating special needs students who may require life support apparatus.

### **Indiana’s State School Bus Committee**

The SSBC faces a difficult task in establishing performance standards for school bus drivers, as performance standards must be based upon the essential functions of the job. The essential functions are the fundamental job duties, as determined by the employer, based in part upon the written job description. For school bus drivers, local school corporations are the employers of the drivers, not the SSBC. The SSBC must first determine the essential functions of the job of a school bus driver in order to begin the process of setting standards and measurements. The SSBC has begun its task by examining performance standards and measurements from other states. Only four other states currently have such standards.

Summary of School Bus Driver Physical Performance Standards and Measurements:  
New York, Washington, Oregon, Florida

*New York*

1. Climb and descend bus steps.  
Measurement: Climb and descend the bus steps 3 times within 30 seconds.
2. Have quick reaction time from throttle to brake.  
Measurement: Demonstrate the ability to alternately activate the throttle and brake controls ten times in 10 seconds.
3. Repeatedly depress clutch and/or brake pedal.  
Measurement: Depress and hold the brake pedal a minimum of 3 seconds, five consecutive times. In vehicles equipped with a clutch, the driver must depress and hold the clutch pedal for the duration of the brake pedal test.
4. Repeatedly open and close a manually operated bus entrance door.  
Measurement: Manually open and close the bus entrance door 3 consecutive times.
5. Operate hand controls simultaneously and quickly.  
Measurement: Demonstrated while the vehicle is in motion, with the driver operating a minimum of 2 hand controls on both sides of the steering wheel, while maintaining control of the vehicle at all times. Each response must be completed within 8 seconds of the request.
6. Exit quickly oneself and students from an emergency door.  
Measurement: Starting in a seat belted position, leave the driver's seat and exit the bus from the rear most floor level emergency door exit within 20 seconds.
7. Carry or drag individuals in a bus emergency procedure.  
Measurement: Demonstrate the ability to drag or carry a 125 pound object 30 feet in 30 seconds.

*Washington*

1. Is physically able to maneuver and control a school bus under all driving conditions.
2. Is physically able to use all hand or foot operated controls and equipment found on state minimum specified school buses.
3. Is physically able to perform daily routine school bus vehicle safety inspections and necessary emergency roadside services.
4. Has sufficient strength and agility to move about in a school bus as required to provide assistance to students in evacuating the bus. The driver must be able to move from a seated position in a sixty-five passenger school bus, or the largest school bus the driver will be operating, to the emergency door, open the emergency door, and exit the bus through the emergency door, all within twenty-five seconds.

*Oregon*

1. No impairment of use of foot, leg, finger, hand or arm, or other structural defect or limitation,

likely to interfere with safe driving or other responsibilities of a school bus driver.

2. Drivers may be required to demonstrate ability to:
  - a. open and close a manually operated bus entrance door control with a force of at least 30 pounds;
  - b. climb and descend steps with a maximum step height of 17 ½ inches;
  - c. operate two hand controls simultaneously and quickly;
  - d. have a reaction time of ¾ of a second or less from the throttle to the brake control;
  - e. carry or drag a 125 pound person 30 feet in 30 seconds or less;
  - f. depress a brake pedal with the foot to a pressure of at least 90 pounds;
  - g. depress a clutch pedal with the foot to a pressure of at least 40 pounds unless operating an automatic transmission;
  - h. exit from an emergency door opening of 24 x 48 inches at least 42 inches from the ground in ten seconds or less.

### *Florida*

1. Applicant did climb and descend the front steps of a 65 passenger bus without pausing.
2. Applicant did open and close a manually operated 65 passenger bus entrance door without difficulty while seated in the drivers seat.
3. Applicant did activate the brake pedal with the right foot in ¾ second or less after removing the right foot from the throttle pedal.
4. Applicant did move from a seated position in the driver's seat of a 65 passenger bus to the rear of the bus, open the emergency door and exit the bus all within 20 seconds.
5. Applicant did operate the driving controls using both arms simultaneously and quickly. For example, activate master panel switches or shift gears while keeping one hand on the steering wheel of a 65 passenger bus traveling 25 miles per hour. (Activity #5 is to be done last only if all prior activities are successfully completed.)

In addition to examining the standards of other states, the SSBC has conducted a survey to help determine the activities of a school bus driver as well as the risk or degree of harm involved if a driver is unable to perform the activity. The results of this survey appear on the website of the SSBC at <http://www.doe.state.in.us/safety/ssbc.html>, and are summarized below:

Activity Statements	Frequency Performed							Importance/Degree of Harm						
	1 - Seldom	2 - Frequently	3 - Regularly	4 - Always				1 - No/slight amount of harm	2 - Moderate amount of harm	3 - Substantial amount of harm	4 - Critical amount of harm			
	All Respondees (193)	School Bus Drivers (78)	School Transportation Personnel	Patron	Monitor	Male (91)	Female	All Respondees	School Bus Drivers (78)	School Transportation Personnel	Patron	Monitor	Male (91)	Female
Accelerator to brake	3.7	3.7	3.7	3.7	3.0	3.8	3.7	3.7	3.8	3.6	3.6	2.5	3.7	3.6
Hold brake or clutch for extended time period	2.7	2.7	2.7	2.8	1.0	2.8	2.7	3.2	3.3	3.2	3.1	2.0	3.2	3.2
Set / release emergency brake	2.9	3.1	2.8	2.4	3.0	2.8	2.9	3.1	3.3	2.9	2.9	2.5	2.9	3.2
Bend over / reach	2.6	2.6	2.5	2.3	3.0	2.5	2.6	2.5	2.5	2.5	2.8	3.0	2.3	2.7
Reach above your head	2.0	2.0	1.9	2.3	1.0	2.0	2.0	2.1	2.0	2.0	2.4	1.0	2.0	2.2
Opening / closing hood	2.1	2.1	2.2	1.9	1.0	2.2	1.9	2.2	2.3	2.1	2.2	3.0	2.1	2.3
Stepping	3.3	3.5	3.2	3.2	3.0	3.3	3.4	3.0	2.9	2.1	3.1	3.0	2.9	3.0
Sit in one place less than two hours	3.1	3.2	3.2	2.8	1.5	3.1	3.1	2.1	2.0	2.1	2.4	1.5	2.1	2.1
Sit in one place more than two hours	1.9	1.7	1.8	2.1	2.0	1.7	2.0	1.9	1.9	1.9	2.2	2.0	1.9	2.0
Sit in one place more than four hours	1.2	1.2	1.2	1.4	1.0	1.2	1.3	1.7	1.7	1.6	2.0	1.0	1.6	1.8
Walking at the transportation facility	3.4	3.4	3.4	3.1	3.5	3.4	3.3	2.9	3.0	3.0	2.6	3.0	3.0	2.9
Operating instrument panel switches	3.6	3.6	3.6	3.4	3.0	3.6	3.6	3.1	3.2	3.0	3.4	2.0	3.2	3.1
Opening / closing manual service door	3.4	3.4	3.4	3.2	3.0	3.3	3.4	3.2	3.3	3.2	3.3	2.5	3.2	3.3

Activity Statements	Frequency Performed							Importance/Degree of Harm						
	1 - Seldom	2 - Frequently	3 - Regularly	4 - Always				1 - No/slight amount of harm	2 - Moderate amount of harm	3 - Substantial amount of harm	4 - Critical amount of harm			
Lifting passenger by self	1.2	1.3	1.1	1.4	1.0	1.2	1.3	2.9	2.8	2.9	3.0	4.0	2.8	3.0
Drag person 150' by self	1.0	1.0	1.0	1.1	1.0	1.0	1.0	3.0	2.9	2.9	3.3	4.0	3.0	3.1
Carry person 150' by self	1.0	1.0	1.0	1.1	1.0	1.0	1.0	2.9	2.9	2.7	3.1	4.0	2.8	2.9
Exit rearmost floor level emergency door	1.2	1.2	1.1	1.3	1.5	1.2	1.2	3.1	3.1	3.0	3.4	3.0	3.1	3.1
Re-enter bus through rearmost floor level emergency door	1.1	1.1	1.1	1.0	2.0	1.1	1.0	2.8	2.9	2.5	3.3	3.5	2.7	3.0
Assist passenger in evacuation through floor level emergency door	1.2	1.2	1.1	1.1	2.5	1.2	1.2	3.3	3.3	3.2	3.6	3.5	3.2	3.4
Assist passenger in evacuation through service door	1.3	1.4	1.4	1.2	2.5	1.3	1.4	3.2	3.2	3.1	3.5	3.5	3.2	3.3
Get in / out of bus through service door	2.8	3.0	2.9	2.4	3.0	2.8	2.8	3.1	3.1	3.0	3.2	3.5	3.0	3.1
Simultaneous control of steering wheel and comp. driving function	3.4	3.5	3.3	3.3	3.0	3.2	3.5	3.3	3.4	3.1	3.3	3.0	3.3	3.3
Control bus in routine driving situations	3.7	3.8	3.7	3.7	4.0	3.7	3.8	3.6	3.7	3.4	3.6	3.0	3.6	3.5
Control bus in emergency driving situations	1.8	1.8	1.6	2.0	1.0	1.6	1.9	3.7	3.8	3.7	3.8	4.0	3.7	3.8
Ability to distinguish colors, specifically red, green, yellow	3.8	3.8	3.8	3.7	4.0	3.7	3.9	3.6	3.5	3.5	3.7	3.5	3.6	3.6
Move (shift) in drivers seat to see around mirrors or obstructions	3.1	3.0	3.1	3.4	3.0	2.9	3.3	3.5	3.6	3.3	3.7	3.0	3.5	3.6
Use physical effort to control passenger	1.4	1.2	1.3	1.7	2.5	1.3	1.4	3.1	3.1	2.9	3.3	3.5	2.9	3.2
Depth perception	3.8	3.8	3.8	3.7	4.0	3.8	3.7	3.6	3.6	3.6	3.7	4.0	3.6	3.7

If the SSBC fulfills its legislative mandate and establishes performance standards and measurements (as opposed to physical characteristics as determined by a physician pursuant to I.C. 20-9.1-3-1(a)(7)), the SSBC will be determining not only what abilities are required but how to measure such abilities, as



well as a minimum standard required to be a school bus driver in Indiana.<sup>45</sup> Performance standards are based upon the essential functions of a job, as established by employers. Essential functions are determined by the employer's needs for a specific position, and are generally contained within a written job description. Since the SSBC is not an employer of school bus drivers, it will need to rely upon the input of others to determine the essential functions of the job. A review of job descriptions would be essential in making such a determination.

The SSBC will need to balance the requirements of the ADA, Section 504 of the Rehabilitation Act of 1973, and Indiana's Employment Discrimination Against Disabled Persons Act with safety considerations for the transportation of school children. Performance standards and measurements will need to be established in a manner such that they do not discriminate against individuals with disabilities. A school corporation that hires school bus drivers will also need to be aware that rigid reliance upon any standards established by the SSBC will not necessarily protect the school corporation from charges of disability discrimination.

### **COURT JESTERS: *GRINCH* AND BEAR IT**

Federal District Court Judge Joseph F. Irenas once lamented: "The Christmas season brings with it not only sidewalk Santas, mercantile mania, and endless reruns of *It's A Wonderful Life* and *Miracle on 34<sup>th</sup> Street*, but also a spate of constitutional litigation testing the limits to which governmental or public bodies may legally join in the festivities."<sup>46</sup>

And who is responsible for such litigious digressions?

The Grinch.<sup>47</sup>

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<sup>45</sup>The logistics of measuring performance standards was not addressed by the legislature. Is each school corporation employing school bus drivers responsible for measuring each driver's performance, or will the SSBC measure drivers' performances and certify passing drivers? In either case, there probably needs to be consistency in the testing procedures throughout the state. The SSBC may also need to address reasonable accommodations for testing when it determines performance standards. Reasonable accommodation within an application or testing process is required when necessary, in addition to reasonable accommodation within the work environment. 29 CFR § 1630.2(o).

<sup>46</sup>Clever v. Cherry Hill Tp. Bd. of Ed., 838 F.Supp. 929, 931 (D. N.J. 1993). See also "Religious Symbolism and Accommodation," **Quarterly Report** July-September 1998.

<sup>47</sup>The Grinch is a character created by the late Theodor Seuss Geisel's 1957 children's book *How the Grinch Stole Christmas*, which was made into a 25-minute animated film in 1968 and a full-

Or, according to one federal judge, “Grinch, Esq.”<sup>48</sup>

In Ganulin v. United States, 71 F.Supp.2d 824 (S.D. Ohio 1999), a Cincinnati lawyer filed suit challenging the constitutionality of a federal law declaring Christmas Day a legal public holiday (and giving federal employees the day off).<sup>49</sup> The plaintiff asserted this law, 5 U.S.C. §6103, violates the First Amendment’s Establishment Clause as well as his constitutional rights to equal protection and freedom of association. By declaring Christmas Day a legal holiday, Ganulin argued, non-Christians suffer from “a form of imposed assimilation and association,” his children’s respect for his beliefs and practices are undermined, he is made to feel “like a political outsider,” and he suffers from “psychological harm.”

The court was unpersuaded, particularly since the U.S. Supreme Court has repeatedly noted that Christmas is a legal public holiday with strong secular components and traditions.<sup>50</sup> “By giving federal employees a paid vacation day on Christmas, the government is doing no more than recognizing the cultural significance of the holiday,” Judge Susan Dlott wrote at 834. She did not confine herself to the legal dissection of Ganulin’s assertions. Apart from her written decision, Judge Dlott wrote at 825-26.<sup>51</sup>

The Court will address Plaintiff’s seasonal confusion  
Erroneously believing Christmas **merely** a religious intrusion.

Whatever the reason, constitutional or other,

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length movie in 2000. Geisel wrote under several pseudonyms, the most famous being “Dr. Seuss.” He also authored children’s books under the pseudonym of “Theo. LeSieg,” the latter a reversal of the letters in his actual surname.

<sup>48</sup>“Grinch” has entered the lexicon of the American language as a noun, meaning “a person or thing that spoils or dampens the pleasure of others.” *Random House Webster’s Unabridged Dictionary*, 2<sup>nd</sup> Edition (1998).

<sup>49</sup>Indiana has a similar law. See I.C. 1-1-9-1.

<sup>50</sup>See, for example, Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984) and Allegheny Co. v. ACLU Greater Pittsburgh Chpt., 492 U.S. 573, 109 S.Ct. 3086 (1989).

<sup>51</sup>The judge’s nine-stanza poem was written in all capital letters with little punctuation beyond occasional exclamation points. Internal punctuation has been added. All emphasized words are the judge’s original indications.

Christmas **is not** an act of Big Brother!<sup>52</sup>

Christmas is about joy and giving and sharing;  
It is about the child within us. It is mostly about caring!

One is never jailed for not having a tree,  
For not going to church, for not spreading glee!

The Court will uphold seemingly contradictory causes,  
Decreeing “The Establishment” **and** “Santa” **both worthwhile** “Claus(es)”!

We are all better for Santa—the Easter Bunny too!  
And maybe the Great Pumpkin, to name just a few!

The Court having read the lessons of “Lynch,”  
**Refuses** to play the role of the Grinch!

There is room in this country—and in all of our hearts too—  
For different convictions and a day off too!

In a newspaper article distributed by the Scripps Howard News Service and published on December 8, 1999, Judge Dlott admitted she was inspired by Geisel. “I thought it was apt in light of Dr. Seuss and ‘How the Grinch Stole Christmas.’” Accordingly, she dismissed the attorney’s suit.

“Grinch” he may be, but Benjamin Franklin, in Poor Richard’s *Almanack* (1734), described him first: “Necessity knows no law; I know some attorneys of the same.”

### QUOTABLE...

This complaint is another example of a prevalent disposition by parties and lawyers to litigate over every source of unhappiness to which humankind may be subject. While it might be considered unfortunate that a boy be dismissed from the high school band, it is much more unfortunate that his mother saw fit to take the matter to court and that she was able to find a lawyer willing to do her bidding.

...

Indeed, if courts seriously entertain suits such as this, not only will the courts fall into disrepute, but much more gravely, the Constitution will become the subject of derision.

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<sup>52</sup>“Big Brother” is from George Orwell’s novel *1984*, where the term was first applied to the State as an entity engaged in ruthless invasion of the privacy of its citizens in order to exercise control.

It is a serious mistake to treat the Constitution as a brooding presence, ever present in time of need, able to right any wrong, correct any evil, set straight that which has gone awry, feed the hungry, and clothe the naked. The Constitution is a law. It provides the framework of our government and sets forth certain restrictions upon the government's ability to interfere with fundamental rights of free men and women. Suits such as this trivialize our Constitution.

Federal District Court Judge D. Dortch Warriner writing in Bernstein v. Menard, 557 F.Supp. 90, 91 (E.D. Va. 1982), dismissing an action by a parent against a school, challenging the dismissal of the parent's child from the high school band claiming, in part, a constitutional right to play a trumpet.

Date: \_\_\_\_\_

\_\_\_\_\_  
Kevin C. McDowell, General Counsel  
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at [www.doe.state.in.us/legal/](http://www.doe.state.in.us/legal/).

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